Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 89-2217

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN A. FARNSWORTH, PETITIONER

v.

SEA-LAND SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly dismissed petitioner's amended complaint as untimely.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2017

JOHN A. FARNSWORTH, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. 16) is unreported. The opinion of the district court (Pet. 20-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1990. A petition for rehearing was denied on March 8, 1990. Pet. 17-19. The petition for a writ of certiorari was filed on June 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 29, 1987, petitioner filed an action in the United States District Court for the Eastern District of

Louisiana against the United States and his maritime employers, respondents Sea-Land Service, Inc. and Sea-Land Corporation. Petitioner claimed to have suffered injuries aboard a United States vessel on December 30, 1985, and thus sought relief under the Jones Act, the Suits in Admiralty Act, and general maritime law. Petitioner filed his suit the day before the expiration of the applicable two-year limitations period. See 46 U.S.C. 745. Petitioner, however, failed properly to serve the United States within 120 days, as required by Fed. R. Civ. P. 4(d)(4) and (j). Pet. 5, 21.

In January 1989, the United States filed a motion to dismiss petitioner's complaint without prejudice under Fed. R. Civ. P. 4(j). Petitioner responded by filing an amended complaint in February. In March, the district court granted the United States' motion and dismissed petitioner's original complaint without prejudice. Thereafter, the United States filed a motion to dismiss petitioner's amended complaint as untimely. Pet. 20-21.

2. In May 1989, the district court granted that motion and dismissed petitioner's amended complaint. Pet. 20-24. The court stated that "federal limitation periods are tolled from the date a suit is filed *as long as service is effected within a reasonable time*." Pet. 20-21 (quoting *Maxwell* v. *Swain*, 833 F.2d 1177, 1178 (5th Cir. 1987)). Since petitioner had not effected proper service of his initial complaint, the court concluded, his "filing of [that] complaint did not toll the statute of limitations." Pet. 21. Moreover, since the "Rule 4(j) dismissal [left petitioner] in the position in which he would have been had the complaint never been filed," the court held that petitioner's "amended complaint cannot relate back to the date of the filing of the original complaint." *Ibid.*

The court of appeals summarily affirmed in an unpublished judgment order. Pet. 16.

ARGUMENT

Petitioner contends (Pet. 7-13) that the district court erred in dismissing the amended complaint as untimely because the original complaint had been filed before expiration of the two-year limitations period. That contention is groundless. The district court properly dismissed petitioner's initial complaint for inadequate service under Fed. R. Civ. P. 4(j), a ruling petitioner does not dispute here. Pet. 7-8, 9. Petitioner may not avoid the consequences of that lapse, and the resulting bar of the applicable statute of limitations, by filing an amended complaint against the same defendants outside the limitations period. As the district court stated, the "Rule 4(j) dismissal [left petitioner] in the position in which he would have been had the complaint never been filed." Pet. 21.[1] Accordingly, the district court properly dismissed petitioner's amended complaint as untimely.

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[1] Contrary to petitioner's suggestion (Pet. 11-13), the relation-back provisions of Fed. R. Civ. P. 15(c) are inapplicable here since the amended complaint neither named a new party nor added a new claim to an otherwise properly served and filed complaint. Cf. *Schiavone* v. *Fortune*, 477 U.S. 21, 29-32 (1986); *Bell* v. *Veterans Administration Hospital*, 826 F.2d 357, 360 (5th Cir. 1987).

Petitioner's reliance (Pet. 12) on *Ashland* v. *Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1436-1437 (9th Cir. 1983), is mistaken, since there the court of appeals invoked Rule 15(c) under the assumption that the original complaint had otherwise been properly served. For similar reasons, petitioner's citation (Pet. 8-9) to *West* v. *Conrail*, 481 U.S. 35 (1987), is wide of the mark. In *West*, the Court held that

> when the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been "commenced" in compliance with [Fed. R. Civ. P. 3] within the borrowed period.

481 U.S. at 39. The Court had no occasion to consider the effect of a party's failure to comply with Fed. R. Civ. P. 4(j) on an otherwise

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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properly "commenced" action – the circumstances at issue here – since the plaintiff in *West* had perfected service as required by Rule 4(j). See 481 U.S. at 36.

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